COUNTY OF LOS ANGELES

CLAIMS BOARD

500 WEST TEMPLE STREET

LOS ANGELES, CALIFORNIA 90012

October 4, 2004

Honorable Board of Supervisors
383 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012

Re: **Allen Rose v. County of Los Angeles**
Long Beach Superior Court Case No. NC 034 363

Dear Supervisors:

The Claims Board recommends that:

1. The Board authorize settlement of the above-entitled action in the amount of $300,000.00.

2. The Auditor-Controller be directed to draw a warrant to implement this settlement from the Public Defender.

Enclosed is the settlement request and a summary of the facts of the case.

Also enclosed, for your information, is the Corrective Action Report submitted by the Public Defender.

Return the executed, adopted copy to Georgene Salisbury, Suite 648 Kenneth Hahn Hall of Administration, Extension 4-9910.

Very truly yours,

Maria M. Oms, Chairperson
Los Angeles County Claims Board

MMO:gs

Enclosures

MEMORANDUM

September 27, 2004

TO: THE LOS ANGELES COUNTY CLAIMS BOARD

FROM: LAURA INLOW
Lewis, Brisbois, Bisgaard, and Smith

ROGER H. GRANBO
Principal Deputy County Counsel
General Litigation Division

RE: **Allen Rose v. County of Los Angeles**
Long Beach Superior Court Case No. NC 034363

DATE OF INCIDENT: August 7, 2002

AUTHORITY REQUESTED: $300,000

COUNTY DEPARTMENT: Public Defender

CLAIMS BOARD ACTION:

☐ Approve ☐ Disapprove ☐ Recommend to Board of Supervisors for Approval

_____, Chief Administrative Office
ROCKY A. ARMFIELD

_____, County Counsel
JOHN F. KRATTLI

_____, Auditor-Controller
MARIA M. OMS

on _____, 2004

SUMMARY

This is a recommendation to settle for $300,000, a professional malpractice lawsuit filed by Allen Rose, who claims that because of the negligence of his Deputy Public Defender, he was improperly sentenced pursuant to the Three Strikes law, and served more prison time than he should have.

LEGAL PRINCIPLES

A Deputy Public Defender may be found liable for professional malpractice if the legal work he or she provides falls below the professional standard of care for attorneys practicing in the same field, and causes damage to the person he or she is representing.

The County is liable for the negligent and intentional acts of its employees when the acts are done in the course and scope of employment.

SUMMARY OF FACTS

In 1994, Allen Rose was criminally charged with assault with great bodily injury, and making terrorist threats. He plead guilty to the assault, and was sentenced to twelve years in state prison pursuant to the Three Strikes law, which enhanced criminal sentences for certain repeat offenders.

After serving approximately eight years of the sentence, Mr. Rose discovered that he was improperly sentenced under the Three Strikes law because the crime for which he was convicted was committed prior to the enactment of the Three Strikes law. He filed with the Court a Petition for Writ of Habeas Corpus which was granted, and he was released after serving eight years and three months in prison.

According to Mr. Rose's calculation, he was over-detained for a minimum of five years and three months. According to our calculation, he was over-detained for not longer than one year and four months.

DAMAGES

Should this matter proceed to trial, we estimate the potential damages could be as follows:

Emotional Distress	$1,000,000

The proposed settlement calls for the County to pay Mr. Rose $300,000 for all of his damages, costs, and attorney fees.

STATUS OF CASE

The trial court proceedings have been suspended pending consideration of the proposed settlement.

Expenses incurred by the County in defense of this action are attorney fees of $3,660 and $2,680 in costs.

EVALUATION

This is a case of probable liability. The Public Defender's Office acknowledges that the Deputy Public Defenders who handled Mr. Rose's case failed to recognize that the Three Strikes law did not apply. A reasonable settlement at this time will avoid further litigation costs, and a jury verdict that could exceed the proposed settlement.

We join with our private counsel, Lewis, Brisbois, Bisgaard, and Smith, and our third party administrator, Carl Warren and Company, in recommending a settlement of this matter in the amount of $300,000. The Public Defender's Office concurs in the recommendation.

APPROVED:

GARY N. MILLER
Assistant County Counsel
General Litigation Division

RHG:scr

Los Angeles County Public Defender's Office

Corrective Action Plan

September 13, 2004

LAWSUIT: Allen Rose v. County of Los Angeles, et. al.
Case #NC034363

INCIDENT DATE: July 12, 1994

INCIDENT LOCATION: Los Angeles County Superior Court, Long Beach Branch

ISSUES

Plaintiff, a Los Angeles County Public Defender client, alleges professional malpractice, violation of Civil Code Section 52.1, false imprisonment and negligence during the handling of his 1994 criminal case by the Los Angeles County Public Defender's Office. Specifically, plaintiff contends that he was persuaded to plead guilty and was over-incarcerated because the Deputy Public Defenders who handled his case failed to recognize that he was being wrongly prosecuted under the "Three Strikes" law.

INVESTIGATIVE REVIEW

Plaintiff was charged in a 1994 criminal complaint with assault with great bodily injury and terrorists threats under the "Three Strikes" law. Court records indicate that plaintiff plead guilty to assault with great bodily injury, admitted a five year prior and was sentenced under the "Three Strikes" law to a term of 12 years in state prison. The investigative review revealed that although plaintiff came through the criminal justice system shortly after the "Three Strikes" law was enacted, the offense in plaintiff's criminal case actually preceded the enactment date of the new law and therefore should not have been subject to the sentencing enhancements of the "Three Strikes" law.

Complicating a review of the matter was the fact that the public defender case file could not be located in archives despite a thorough and diligent search.

CORRECTIVE ACTIONS

The investigative review revealed that despite having been trained, the Deputy Public Defenders who handled plaintiff's criminal case failed to recognize that the "Three Strikes" law did not apply in the case because the alleged crime was committed before the law was enacted.

Allen Rose v. County of Los Angeles, et.al.
Case #NC034363
September 13, 2004

Although it is unlikely that new cases, with offense dates before the enactment of "Three Strikes" (March 7, 1994), would now make their way through the criminal justice system, the Public Defender's Office continues to publish and distribute to all Deputy Public Defenders frequently updated summaries of the "Three Strikes" law (Attachment A). Additionally, the Department posts these summaries electronically on the Public Defender Web Site (PDWeb) for review by all Deputy Public Defenders.

Future changes in the law which contain similar retroactivity issues will be evaluated, summarized and distributed to all Deputy Public Defenders both in hard copy form and electronically on the PDWeb. One such summary relates to Proposition 66, which if passed in the November 2, 2004 election, will become law and will not be retroactive in certain regards. The attached summary of Proposition 66 (Attachment B) is now posted electronically on the PDWeb and a version of the summary will be distributed in hard copy form to all Deputy Public Defenders on September 15, 2004.

Lastly, the Public Defender's Office represents clients in over 500,000 cases each year and is mandated by law to retain these case files indefinitely. As the investigation revealed, retention, maintenance and efficient retrieval of case files is in need of a vast overhaul. As such, the Department will seek additional funding to address the storage, maintenance and retrieval of this ever growing volume of cases. Traditional storage options as well as alternatives such as electronic storage via large scale scanning devices will be evaluated.

ATTACHMENT A

THREE STRIKES UPDATE

August, 2004

by Alex Ricciardulli


Download: cu04_08.wpd


Back to HOME.

I

OVERVIEW

There are two Three Strikes laws: one enacted by the Legislature in PC § 667(b)-(i), and another enacted by initiative in PC § 1170.12. The California Supreme Court has held that both laws are virtually identical. (Hazelton (1996) 14 Cal.4th 101.) Three Strikes consists of the following:

A. Three-Strikes Provision: A defendant who commits any felony with two or more "strike" priors must be sentenced to at least 25-years-to-life in state prison. (PC § 667(e)(2).)

B. Two-Strikes Provision: A defendant who commits any felony with one "strike" prior must be sentenced to twice the base term of the current felony. (PC § 667(e)(1).)

C. Reduction In Time Credits Provision: A defendant who commits a felony with one "strike" prior must serve at least 80% of his or her sentence in prison; the defendant's good-time/work-time while the defendant is in prison cannot exceed one-fifth of the total term in prison. (PC § 667(c)(5).) A defendant who commits a felony with two or more "strike" priors gets **NO** good-time/work-time credits while in prison towards his or her 25- years-to-life sentence. (In re Cervera (2001) 24 Cal.4th 1073.)

II

EFFECTIVE DATE

The new felony must have occurred on or after 2:45 p.m. 3/7/94 in order for the Three Strikes law to apply. (Cargill (1995) 38 Cal.App.4th 1551.) If Prop. 21 priors are being used, the current felony must have occurred on or after 3/8/00. (James (2001) 91 Cal.App.4th 1147.)

"Strike" priors may have been suffered before or after March 7, 1994, the date the original Three Strikes law was enacted. (Gonzales (1995) 37 Cal.App.4th 1302.) The same is true for Prop. 21 priors, they can come from before or after 3/8/00. (James; People v. Bowden (2002) 102 Cal.App.4th 387 [juvenile priors].)

III

WHAT ARE "STRIKE" PRIORS?

A. Types Of Priors

1. Convictions in California for "violent" or "serious" felonies under PC §§ 667.5(c) and 1192.7(c) are "strike" priors. (PC § 667(d)(1).)

2. Convictions from outside California's jurisdiction for felonies that have all the elements of "violent" or "serious" felonies under PC §§ 667.5(c) and 1192.7(c) are "strike" priors. (Pen. Code § 667(d)(2).)

3. Juvenile adjudications for certain offenses (usually only those listed in WIC § 707(b)) are "strikes" when the juvenile was 16 or 17 years old at the time of the offense. (PC § 667(d)(3).)

B. Multiple Priors From A Single Past Case

Under Fuhrman (1997) 16 Cal.4th 930, unlike five-year, PC § 667(a) priors, "strike" priors do not have to be "brought and tried separately"; i.e., **YOU CAN GET MULTIPLE PRIORS FROM A SINGLE PAST CASE.**

Benson (1998) 18 Cal.4th 24 held that even when the bar to multiple punishment in PC § 654 barred more than one sentence on the counts in the old case, multiple priors still result.

Nonetheless, the court can, and, maybe, sometimes must dismiss one of the priors under PC § 1385 in furtherance of justice due to the fact that the priors came from a single case.

A court definitely can dismiss: Garcia (1999) 20 Cal.4th 490, 503, approved the court dismissing under Penal Code section 1385 based on priors originating from single past case.

Sometimes a court must dismiss: Benson, supra, 18 Cal.4th 24, 36, fn. 8 found that there can be a situation where a defendant's "prior felony convictions are so closely connected--for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct--that a trial court would abuse its discretion under [Penal Code] section 1385 if it failed to strike one of the priors." (The Court reiterated this statement in Sanchez (2001) 24 Cal.4th 983, 993.)

The Court of Appeal in People v. Burgos (2004) 117 Cal.App.4th 1209 actually applied Benson's fn. 8 and reversed for abuse of discretion! Burgos held that the judge should have dismissed one of the defendant's two "strike" priors and sentenced him to less than 25-years-to-life. The Court of Appeal found that multiple sentences had been barred by Penal Code section 654 on priors which arose from a single act that resulted in convictions for attempted robbery and attempted carjacking. Burgos concluded that this was precisely the type of case referred to by Benson's fn. 8: yes, the two priors counted as separate "strikes," but they were so closely connected, that the judge had to dismiss one of them in furtherance of justice under Penal Code section 1385.

C. Types Of Dispositions That Can Affect Whether Something Becomes A Prior

1. Reduction to misdemeanor of "wobbler" at time of initial sentencing = **NOT** a "strike" prior. (Glee (2000) 82 Cal.App.4th 99; PC § 667(d)(1).)

2. Dismissal of old case under PC § 1385 before current crime is committed = **NOT** a "strike" prior. (Barro (2001) 93 Cal.App.4th 62.)

3. PC § 1203.4 expungement = "strike" prior. (Diaz (1996) 41 Cal.App.4th 1424.)

4. WIC § 1772 expungement of juvenile case upon honorable discharge from California Youth Authority = "strike" prior. (Daniels (1996) 51 Cal.App.4th 520.)

5. Reduction to misdemeanor of "wobbler" after initial sentencing = "strike" prior. (Franklin (1997) 57 Cal.App.4th 68.)

6. The order in which the prior and current cases occur is important. A case only counts as a prior if the defendant was convicted of the case before he committed the new crime. The order in which crimes are committed is irrelevant; the key date is when the defendant was convicted of a case; it is only crimes that happen after conviction that are subject to increased punishment. (People v. Flood (2003) 108 Cal.App.4th 504; accord People v. Rojas (1988) 206 Cal.App.3d 795 [same result for PC 667(a) five-year priors].)

7. However, a case will still count as a "strike" prior even if the defendant had not yet been sentenced on the case when he committed the current offense. (People v. Williams (1996) 49 Cal.App.4th 1632.)

D. Foreign Priors

All priors from out-of-state that have the same elements of a California "serious" or "violent" felony count as "strikes." (Hazelton (1996) 14 Cal.4th 101.)

Even if the prior was "expunged" under the laws of the foreign state, it still counts as a California "strike" prior. (Laino (2004) 32 Cal.4th 878.)

E. Juvenile Priors

The defendant had to have been 16 years of age or older at the time he committed the crime that resulted in the juvenile adjudication (PC § 667(d)(3)(A)), but there is no need for a fitness hearing or for the D.A. to have tried to find the defendant unfit to be dealt with as a juvenile; implied fitness is all that is needed. (Davis (1997) 15 Cal.4th 1096.)

The general rule is that the prior had to be for a crime listed in WIC § 707(b). (Garcia (1999) 21 Cal.4th 1.) (The WIC § 707(b) list is narrower than the adult list of "strikes"; e.g., priors for residential burglary

and most attempts are not listed in WIC § 707(b).)

There are two exceptions to the general rule: (1) Under Garcia, if the defendant was found a ward of the court for an offense listed as a "serious" or "violent" felony (PC §§ 667.5(c), 1192.7(c)) which was not listed in WIC § 707(b), and at the same time he was also found a ward of the court for a crime that was listed in WIC § 707(b), then the non-707(b) offense does count as a "strike" (and so does the 707(b) offense). (2) Under Leng (1999) 71 Cal.App.4th 1, if the defendant was found a ward of the court for a WIC § 707(b) offense and that crime was not also listed as a "serious" or "violent" felony, then the offense does not count as a "strike."

IV

PROPOSITION 21

Proposition 21, the "Gang Violence and Juvenile Crime Prevention Act," added 15 new adult priors, and 9 new juvenile ones.

A. The Most Common New Priors

New adult priors (PC § 1192.7(c)): (1) Terrorist threats; (2) Felonies on behalf of a gang; (3) Witness intimidation; and (4) Conspiracies to commit PC §§ 667.5(c) or 1192.7(c).

New juvenile adjudication priors (WIC § 707(b)): (1) Unarmed robbery; (2) Violations of the 10-20-life law; (3) Voluntary manslaughter; and (4) Carjacking

B. Priors For PC § 245

PC § 1192.7(c)(31) was added by Prop. 21. But, three cases have now held that, even after Prop. 21, not all types of PC § 245s are "strikes": Williams (2001) 92 Cal.App.4th 612, Winters (2001) 93 Cal.App.4th 273, and Haykel (2002) 96 Cal.App.4th 146.

In light of these good cases, a PC § 245 conviction for an assault "by any means of force likely to produce great bodily injury" is still not a "strike": an assault "by any means of force likely to produce great bodily injury" does not involve use of a weapon; this is merely an assault with hands and/or feet.

(Aguilar (1997) 16 Cal.4th 1023.)

However, under Prop. 21, all other assaults in PC § 245 now do count as "strikes." That includes all assaults on peace officers and firefighters (even when no weapon is involved, and when the defendant merely aids and abets the assault), and it also includes all assaults with weapons, even if the defendant did not personally use the weapon.

Finally, due to Haykel, Williams and Winters, if the documents at the trial of a prior do not establish beyond a reasonable doubt that the defendant violated PC § 245 by committing one of the enumerated assaults, and they also do not indicate that the defendant personally inflicted great bodily injury, there will be insufficient evidence to prove the "strike" prior. (See Rodriguez (1998) 17 Cal.4th 253.)

V

SENTENCING WHEN THE DEFENDANT HAS ONLY ONE "STRIKE"

When there is only one "strike" prior, the judge selects the base term for the current felony, and doubles it. (Martin (1995) 32 Cal.App.4th 656.) The judge also doubles one-third the mid-term of subordinate counts imposed consecutively. (Nguyen (1999) 21 Cal.4th 197.) And the same rule applies if the cases are from different counties. (Riggs (2001) 86 Cal.App.4th 1126.) Conduct enhancements, such as using a gun, and enhancements for prior convictions, are not doubled. (Dominguez (1995) 38 Cal.App.4th 410.)

If the current felony carries a life sentence and states a minimum parole eligibility period (like second degree murder, 15-to-life), this period is doubled. (PC § 667(e)(1).) If the current felony calls for a sentence of "life" in prison, and fails to specify a minimum term for parole eligibility (e.g, attempted premeditated murder), the court doubles the 7-year period set forth in PC § 3046. (Jefferson (1999) 21 Cal.4th 86.)

Dual use of the same prior as a "strike" prior and as a five-year, PC § 667(a) prior is required when the current offense is a "serious" felony. (Ramirez (1995) 33 Cal.App.4th 559.) Dual use as both a "strike"

and as a 1-year PC § 667.5(b) prior is also required (Cressy (1996) 47 Cal.App.4th 981). The same is true of dual use of same prior as "strike" and as a component of current offense (Garcia (2001) 25 Cal.4th 744 [PC § 290], Nobleton (1995) 38 Cal.App.4th 76 [PC § 12021], White Eagle (1996) 48 Cal.App.4th 1511 [PC § 666]).

Finally, dual use of the same prior is allowed under the Habitual Sex Offender statute (PC § 667.61) and as a "strike" prior. (Murphy (2001) 25 Cal.4th 136.) And the same is true of dual use as both a "specified circumstance" under the One Strike law (PC § 667.61) and as a "strike" prior. (Acosta (2002) 29 Cal.4th 105.)

VI

SENTENCING WHEN THE DEFENDANT HAS AT LEAST TWO "STRIKES"

When there are two or more "strike" priors, the sentence for the current felony must be at least 25-years-to-life. (PC § 667(e)(2).) If the current offense is first degree murder, the sentence is 75 years to life. (PC § 667(e)(2)(A)(i); Mendoza (2000) 78 Cal.App.4th 918 [25-year term gets tripled].) If the current offense is second degree murder, the sentence is 45 years to life. (PC § 667(e)(2)(A)(i); cf. Ervin (1996) 50 Cal.App.4th 259 [15-year term gets tripled].)

Dual use of the same prior as a "strike" prior and as a five-year, PC § 667(a) prior is required when the current offense is a "serious" felony. (Dotson (1997) 16 Cal.4th 547.)

If there are multiple felony counts, a separate 25-year-to-life sentence must be given for each count. (Cartwright (1995) 39 Cal.App.4th 1123 [15 new felonies = 375 to life!])

VII

MANDATORY OR DISCRETIONARY CONSECUTIVE SENTENCING?

A. Consecutive Sentencing On Current Felonies

With at least one "strike" prior, consecutive sentencing on counts is mandatory unless "the current felony convictions are committed on the same occasion or arise out of the same set of operative facts." (PC § 667(c)(6); Deloza (1998) 18 Cal.4th 585.)

This rule is broader than PC § 654: Deloza held that counts are committed "on the same occasion" when there is a "close temporal and spatial proximity" between a defendant's crimes. (Id., at p. 596.)

B. If Deloza does not apply, and the judge decides to dismiss "strikes" regarding some of the counts, can the judge run the sentences on those counts concurrently? **NO!**

In People v. Casper (2004) 33 Cal.4th 38, the California Supreme Court held that if the defendant is convicted of multiple counts where the underlying crimes did not occur on the same occasion, and at least one "strike" prior is proved, the judge must order that the sentences on the counts run consecutive to one another. Under Casper, even if the judge dismisses the "strike" prior with respect to some of the counts in furtherance of justice under Penal Code section 1385, the judge must still order that the sentences on all the counts be served consecutively.

Casper does not impact a judge's power to reduce a sentence by dismissing the actual counts under Section 1385. Judges have the power to dismiss entire counts. (People v. Burke (1956) 47 Cal.2d 45, 51.) In Casper, the judge could have imposed a doubled sentence on one of the counts, and then dismissed the remaining counts under Section 1385. The net effect would have been the same as if the judge had ordered concurrent sentences: the defendant would have served only one sentence, the one doubled by the "strike."

C. Consecutive Sentencing And Probation Violations

When the defendant has only one "strike" prior and has a probation violation case, consecutive sentencing is not mandatory if the defendant is first sentenced on the "strike" case, and is then sentenced on the probation violation case. If the defendant is first sentenced on the probation case and then the "strike" case, consecutive sentences are required. (Rosbury (1997) 15 Cal.4th 206.)

When the defendant has two or more "strike" priors and has a probation violation case, consecutive sentencing on the "strike" case and probation violation case is mandatory regardless of which case is sentenced first. (Helms (1997) 15 Cal.4th 608.)

VIII

DISMISSAL OF "STRIKE" PRIORS UNDER PC § 1385

A. Judges Have The Power

The judge can dismiss "strike" priors under PC § 1385 in the furtherance of justice even when the prosecution objects, thereby avoiding a Three Strikes sentence. (Romero (1996) 13 Cal.4th 497.) The PC § 1385 dismissal may occur "before, during or after trial, up to the time judgment is pronounced." (Romero, supra, 13 Cal.4th 497, 524, fn. 11.)

A judge can even dismiss a "strike" prior under PC § 1385 and grant the defendant probation. (In re Varnell (2003) 30 Cal.4th 1132, 1141; People v. Aubrey (1998) 65 Cal.App.4th 279.)

B. Judges Can Abuse The Power

It is an abuse to dismiss if the defendant's record and current offense are so bad that the defendant falls within the "spirit" of the 3-Strikes law. (Williams (1998) 17 Cal.4th 148.) Garcia (1999) 20 Cal.4th 490 held that a judge did not abuse his discretion in imposing one 25-years-to-life sentence rather than two. The Supreme Court ruled that the defendant was properly found to be outside the "spirit" of 3-Strikes. Garcia approved the judge's actions based on the following factors:

"[1] defendant's prior convictions all arose from a single period of aberrant behavior for which he served a single prison term. [2] Defendant cooperated with police, [3] his crimes were related to drug addiction, and [4] his criminal history does not include any actual violence." (Garcia, supra, 20 Cal.4th 490, 503.)

Another proper consideration is the nature of the current offense: "A court might therefore be justified in striking prior felony conviction allegations with respect to a relatively minor current felony, while considering those prior convictions with respect to a serious or violent current felony." (Garcia, supra, 20 Cal.4th 490, 499.)

Further, "[A] defendant's sentence is also a relevant consideration when deciding whether to strike a prior conviction; in fact it is the overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences." (Garcia, supra, 20 Cal.4th 490, 500.)

Two Court of Appeal cases are very favorable for the defense on abuse of discretion. They approved judges dismissing priors despite the defendants' lengthy criminal records: Bishop (1997) 56 Cal.App.4th 1245; Saldana (1997) 57 Cal.App.4th 620.

Some Court of Appeal cases, however, have reversed due to abuse of discretion, despite extenuating circumstances and/or minor current offenses. (See, e.g., Gaston (1999) 74 Cal.App.4th 310 [current offense of VC § 10851; defendant was a 44-year-old diabetic]; Strong (2001) 87 Cal.App.4th 328 [current offense of sales-in-lieu of cocaine].)

Carmony (2004) 14 Cal.Rptr.3d 880 held that it is possible for a judge to abuse his discretion in failing to dismiss "strike" priors. In addition to failing to dismiss when two prior are very closely connected (see Benson, fn. 8; Burgos (2004) 117 Cal.App.4th 1209), abuse can result if the judge is not "aware of its discretion to dismiss" or "where the court considered impermissible factors in declining to dismiss," or when a judge's refusal to dismiss produces "an arbitrary, capricious or patently absurd result under the specific facts of a particular case." Carmony concluded , however, no abuse happened in its case. The judge acknowledged he had power to dismiss under Romero, considered only proper factors regarding the nature of the defendant's background and the current offense, and rationally concluded that given the defendant's long record, mercy was unwarranted in the case.

A case that actually found abuse of discretion in a judge's failing to dismiss priors was Cluff (2001) 87 Cal.App.4th 991. The Court of Appeal found that given the defendant's non-aggravated current offense (failing to update his sex registration under PC § 290(a)(1)(D)), the fact that the defendant was employed, that he had not committed any crimes since being released form prison, and despite his nine "strikes" for child molestation in a single case, the judge probably should have given him less than 25-years-to-life.

IX

DISMISSAL OF OTHER ENHANCEMENTS

This isn't a 3-Strikes issue, but it comes up all the time. What authority says that a judge can dismiss enhancements like personal infliction of GBI, one-year priors, great taking enhancements, and drug quantity enhancements? The Courts of Appeal in Bradley (1998) 64 Cal.App.4th 386 and Herrera (1998) 67 Cal.App.4th 987 clarified this area of law.

Former PC § 1170.1(h) used to list enhancements that a judge could dismiss if the judge found that "there are circumstances in mitigation of the additional punishment." This section used to list one-year prison-priors (PC § 667.5(b)), three-year drug-priors (HSC § 11370.2), and other enhancements. Effective January 1, 1998, the Legislature repealed PC § 1170.1(h).

The Courts of Appeal in Bradley and Herrera held that judges can still dismiss these priors and enhancements; they can do it in the furtherance of justice under PC § 1385.

The appellate courts found that in eliminating PC § 1170.1(h), the Legislature did not mean to upset the status quo. Bradley and Herrera quoted the Legislature stating that, "In repealing subdivision (h) of [Penal Code s]ection 1170.1, which permitted the court to strike the punishment for certain listed enhancements, it is not the intent of the Legislature to alter existing authority and discretion of the court to strike those enhancements . . . pursuant to [Penal Code s]ection 1385 . . . ."

If your judge has any question regarding his or her power to dismiss any of the priors and other enhancements that used to be listed in PC § 1170.1(h), cite the Bradley and Herrera opinions' quote regarding legislative intent. If the judge grants a dismissal, make sure that the judge's reasons regarding why it was in the furtherance of justice to do so get written in the court's minutes, as required by PC § 1385(a).

By the way, here are some other enhancements that used to be listed in PC § 1170.1(h) that the judge can now dismiss under PC § 1385: armed with a weapon enhancements (PC § 12022); out-on-bail/o.r. enhancements (PC § 12022.1); great-takings enhancements (PC § 12022.6); infliction of great bodily injury enhancements (PC § 12022.7); and drug quantity enhancements (HSC §§ 11370.4, 11379.8).

X

REDUCTION OF "WOBBLERS" TO MISDEMEANORS

The 3-Strikes law did not abrogate judges' power to declare wobblers misdemeanors under PC § 17(b); even where "strike" priors are proved, a trial judge may declare the current offense to be a misdemeanor, and give the defendant a non-3-Strikes misdemeanor sentence. (Alvarez (1997) 14 Cal.4th 968.)

XI

CRUEL AND UNUSUAL PUNISHMENT

Contrary to media reports on the subject, the U.S. Supreme Court's cruel and unusual punishment cases did not hold that a Three Strikes sentence is constitutional in every case.

A complete analysis of the Supreme Court's opinions in Ewing v. California (2003) 538 U.S. 11 and Lockyer v. Andrade (2003) 538 U.S. 63 is beyond the scope of this outline. Suffice it to say that the opinions allowed the review of sentences to see if they are disproportionate punishment for the crime at issue. The defendant's 25-years-to-life sentence in Ewing for stealing $1,200 worth of merchandise was not disproportionate due to the defendant's long and violent record. (The Court in Lockyer v. Andrade refused to address the merits of the defendant's 50-years-to-life sentence for stealing videotapes because the federal habeas corpus statute barred such review.)

The 9th Circuit Court of Appeal has issued a very favorable opinion applying Ewing. In Ramirez v. Castro (9th Cir. 2004) 365 F.3d 755 the 9th Circuit held that Three Strikes was cruel and unusual punishment as applied to a defendant convicted of petty theft with a prior (stealing a $199 VCR from Sears) with two "strikes" for robberies that arose from a single past case which involved a minimum amount of force.

Maybe your client's sentence is also unconstitutionally disproportionate under Ewing. Please don't give up on these cases!

XII

DEFERRED ENTRY OF JUDGMENT

A judge CAN grant deferred entry of judgment (DEJ) even if a defendant has one or more "strike"

priors. (Davis (2000) 79 Cal.App.4th 251.) But, if the defendant falls off DEJ he faces sentencing on the underlying charge and sentencing on the "strikes."

If a defendant has a case where the drug offense occurred when the old Diversion law was in effect (before 1/1/97), the defendant can still do Diversion rather than DEJ. (Perez (1998) 68 Cal.App.4th 346.)

XIII

PROPOSITION 36

Defendants convicted on or after July 1, 2001, of possession or transportation for personal use of controlled substances must be sentenced to probation and drug treatment. (PC § 1210.1(a).) Eligible defendants cannot be sentenced to prison or jail unless they violate probation. Some defendants with "strike" priors can qualify for Prop. 36.

A complete discussion of Prop. 36 is contained in a separate outline: **Proposition 36 Update.**

XIV

YOU CAN STILL MAKE BOYKIN/TAHL COLLATERAL CHALLENGES TO CALIFORNIA PRIORS

Allen (1999) 21 Cal.4th 424 held that Boykin/Tahl challenges to prior convictions from California that were suffered on or after 11-7-69 can be made collaterally. (Boykin v. Alabama (1969) 395 U.S. 238; In re Tahl (1969) 1 Cal.3d 122 [11-7-69 was when Tahl was decided].) In other words, you can make the Boykin/Tahl challenge to priors in the case where they are alleged; you do not have to make the challenge in the rendering court where the prior originated.

Notes: Under Boykin/Tahl a defendant must be advised of his constitutional rights and must waive them when pleading guilty to a crime. The defendant must understand that he has the right to a jury trial, the right to confront the witnesses against him, and the right to be free from compelled self- incrimination. If a defendant pled guilty or no contest without intelligently understanding and waiving his or her rights, the plea is invalid, and the case cannot be used as a prior conviction to increase his current sentence. The Supreme Court held in Allen that a defendant can collaterally challenge priors based on Boykin/Tahl.

But, what happens if the prior was suffered in a jurisdiction other than California, like in another state or in federal court?

In a case subsequent to Allen, the Court of Appeal in Green (2000) 81 Cal.App.4th 463 held that a defendant cannot collaterally challenge out-of-jurisdiction priors on Boykin/Tahl grounds unless there is evidence that the foreign state required an on-the-record advisement of rights, like California under Tahl.

XV

TIME CREDIT REDUCTION ISSUES

A. The 3-Strikes' time credit reduction section (PC § 667(c)(5)) does not reduce a defendant's pre-sentence, good-time/work-time credits in jail, it only requires that the defendant serve 80% of his or her prison sentence. (Thomas (1999) 21 Cal.4th 1122.)

B. The reduction applies to enhancements added to the 3-Strikes sentence, like one-year PC § 667.5(b) priors. (Brady (1995) 34 Cal.App.4th 65.)

C. **A DEFENDANT SENTENCED TO 25-YEARS-TO-LIFE UNDER 3-STRIKES DOES NOT REDUCE THE 25-YEAR SENTENCE BY ANY GOOD-TIME/WORK- TIME CREDITS WHILE IN PRISON.** (In re Cervera (2001) 24 Cal.4th 1073.)

D. When the 3-Strikes reduction applies and the reduction in PC § 2933.1 also applies because the defendant is convicted of a current "violent felony" [defendant must serve 85% of sentence], the 85% reduction in 2933.1 applies. (Caceres (1997) 52 Cal.App.4th 106.)

E. The PC § 2933.1 limit does apply to reduce pre-sentencing county jail credits (PC 2933.1(b)), but not if the defendant gets probation. (In re Carr (1998) 65 Cal.App.4th 1525.)

F. The 85% limit reduces credits for non-"violent" subordinate terms, so long as at least one of the defendant's current offenses is "violent." (Palacios (1997) 56 Cal.App.4th 252.)

XVI

PROVING "STRIKE" PRIORS

A. Who Determines Whether A Prior Qualifies As A "Strike," Judge Or Jury?

Answer: The judge makes the call. The California Supreme Court in Epps (2001) 25 Cal.4th 19 reiterated its earlier holding in Kelii (1999) 21 Cal.4th 452 where it had ruled that in the trial on a prior, the judge decides whether the prior qualifies as a "strike."

So, what's left for the jury? Answer: not much, if anything. Epps noted that the Legislature when it last amended PC § 1025--the statute giving defendants the right to jury trial on priors--stated that the issue of identity (whether the prior belongs to the defendant) must be decided by the judge. Since under Kelii the judge also decides whether the prior qualifies as a "strike," what does the jury get to decide?

Epps's answer was that the defendant gets a jury trial on any of the following questions: (1) Whether "the records of the prior conviction may have been fabricated"; (2) Whether "they may be in error"; and (3) Whether "they may otherwise be insufficient to establish the existence of the prior conviction." And, to get a jury trial on any of these questions, the defense must offer evidence that this is a legitimate issue in the case.

Except, maybe, in cases where there are factual issues regarding the priors, like whether the defendant personally inflicted great bodily injury or used a weapon.

There was a great recent case on this: People v. McGee, found at 115 Cal.App.4th 819, but the California Supreme Court granted review. Even so, the reasoning of the court is persuasive.

McGee noted that the California Supreme Court in Epps expressly left undecided whether a defendant has the right to a jury trial on factual issues regarding priors which are not by definition on the list of "strikes," such as ones where the defendant personally used a deadly weapon or personally inflicted great bodily injury, among others. (People v. Epps, supra, 25 Cal.4th 19, 28.) McGee held defendants have the right to jury trial regarding these type of factual issues.

McGee relied on Apprendi v. New Jersey (2000) 530 U.S. 466, and held that a defendant has a due process right to jury trial on factual issues which increase punishment. Factual issues regarding whether a prior counts as a "strike" qualify under Apprendi because if the prior is found true the defendant's sentence can be doubled or increased to 25-to-life.

(The latest case from the U.S. Supreme Court on this topic–Blakely v. Washington (2004) __ U.S. __, 124 S.Ct. 2531, did not reach the issue whether Apprendi applies to priors.)

B. What Type Of Evidence Can Be Used To Prove The Prior?

For adult priors, the entire "record of conviction" can be examined. (Guerrero (1988) 44 Cal.3d 343.) But, for juvenile adjudication priors, if the offense that the juvenile was found guilty of is not on the list in WIC § 707(b), then it does not count as a "strike," and the "record" of the prior cannot be consulted. (Jensen (2001) 92 Cal.App.4th 262.)

So, what's part of the "record of conviction"? Here are some common issues:

1. No live witnesses:

The prosecution may not call eyewitnesses to prove the nature of the prior; the prosecution is limited to documents which are part of the "record of conviction," and are admissible under some exception to the hearsay rule. (Reed (1996) 13 Cal.4th 217.)

Reed hinted that the defense may be allowed to rebut this evidence with eyewitnesses, such as having the defendant testify that his prior was not a "serious felony." However, Bartow (1996) 46 Cal.App.4th 1573, held that the defendant could not call an eyewitness to the crime in the prior, and Henley (1999) 72 Cal.App.4th 555, relied on the defendant's inability to call witnesses to find that the prosecution bore the burden of establishing that the prior qualified as a "strike."

There is now a case which held that a defendant has a constitutional right to testify in the trial of a prior to deny that it belongs to him or to explain why it does not qualify under the law: Gill v. Ayers (9th Cir. 2003) 322 F.3d 678.

2. Preliminary hearing transcripts:

A preliminary hearing transcript of a prior IS part of the "record of conviction" under Guerrero, supra, 44 Cal.3d 343, and the statements of eyewitnesses to the crime in the transcript CAN be used to prove whether the prior is a "serious felony," i.e., a "strike." (Reed (1996) 13 Cal.4th 217.)

But what if the transcript contains Proposition 115 hearsay? Then it cannot be used to prove the prior. (Best (1997) 56 Cal.App.4th 41.)

But what if the defendant had been convicted in the prior after a jury trial, as opposed to a guilty plea? Then the transcript of the trial can be used, but not the transcript of the preliminary hearing. (Houck (1998) 66 Cal.App.4th 350.)

3. Probation reports:

Statements of the probation officer or other witnesses in the report are hearsay, and cannot be used to prove the nature of the prior at issue. (Reed (1996) 13 Cal.4th 217.)

However, the defendant's statements in the probation report qualify under the admissions exception to the hearsay rule (EC § 1220), and thus can be used to prove the nature of the prior. (Monreal (1997) 52 Cal.App.4th 670.)

4. Can the text of a Court of Appeal opinion be used?

Yes, it can. (Woodell (1998) 17 Cal.4th 448.) Woodell approved using an appellate opinion from North Carolina that had affirmed the defendant's conviction.

5. What about Department of Corrections fingerprint cards?

The card can be used to prove identity, but not what type of prior is at issue. (Williams (1996) 50 Cal.App.4th 1405.)

The Court of Appeal in Ruiz (1999) 69 Cal.App.4th 1085 created a narrow exception to the rule in Williams: Ruiz held that when there is an illegible part of an abstract of judgment concerning a prior, a description of the prior in a fingerprint card can be used to clarify the illegible portion.

6. What about rap sheets?

Answer: Rap sheets can be used to prove that the prior belongs to the defendant, but NOT what type of prior is at issue.

The California Supreme Court in Martinez (2000) 22 Cal.4th 106, held that a rap sheet may not be used to prove what type of prior the defendant suffered. For example, in cases where the defendant's prior may or may not count as a "strike" depending on his conduct in the prior (e.g., PC § 245), the contents of the rap sheet cannot be used to establish that the prior qualifies as a "strike." (Martinez, 22 Cal.4th 106, 116.)

C. Sufficiency Of Evidence To Prove "Strike" Priors

1. Priors for PC § 245:

If all the proof a prosecutor has is that the defendant's prior is for "PC 245(a)(1)" and "ASLT GBI / DLY WPN," this is NOT enough to prove a "strike" prior. (Rodriguez (1998) 17 Cal.4th 253.)

The reason for this is because PC § 245(a)(1) can be violated in ways that it would not be a "strike" prior. It is only a prior where a deadly weapon is involved or where the defendant personally inflicted great bodily injury on a person other than an accomplice. Thus, if the defendant is convicted of PC § 245(a)(1) because he used force likely to produce great bodily injury (hands and/or feet with no GBI actually resulting), then it is not a "strike" prior.

Note: In light of Williams v. Superior Court (2001) 92 Cal.App.4th 612, People v. Winters (2001) 93 Cal.App.4th 273, and Haykel (2002) 96 Cal.App.4th 146, which held that not all forms of PC § 245 violations count as "strikes," the Rodriguez rule is still good law.

2. Priors for personal infliction of great bodily injury:

There are two ways that priors for personal infliction of GBI might not count as "strikes": (i) No proof that the defendant directly caused the injury, as opposed to merely "proximately caused the injury." (Rodriguez (1999) 69 Cal.App.4th 341.) (ii) No proof that the injury was not inflicted on an accomplice. (Henley (1999) 72 Cal.App.4th 555.)

3. Federal bank robbery priors:

Proving that the defendant was convicted of "Bank Robbery" in federal court is NOT enough to establish the prior is a "strike." (Jones (1999) 75 Cal.App.4th 616.)

4. What about non-forcible oral copulation with a child (PC § 288a(c)(1))?

Murphy (2001) 25 Cal.4th 136 held that this offense is a "strike." Murphy also probably extends to non-forcible sodomy with a child, PC § 286(c)(1).

XVII

DOUBLE JEOPARDY AND RETRYING PRIORS

Both the U.S. and California Supreme Courts have held that double jeopardy does not apply to prior convictions. (See Monge v. California (1998) 524 U.S. 721; People v. Monge (1997) 16 Cal.4th 826.) Also, neither res judicata nor law of the case will bar retrial following a reversal on appeal. (People v. Barragan (2004) 32 Cal.4th 236.)

The only limit on retrying a prior, as expressly acknowledged by Barragan, is that if the prosecution presents the exact same evidence in the retrial, the judge will have to enter a judgment of acquittal because it would be bound by the appellate court's ruling on the sufficiency of the evidence. (But

practically this will never happen because the D.A. won't retry the prior unless it has more evidence.)

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COMPREHENSIVE REVIEW OF PROPOSITION 66, THE THREE STRIKES LIMITATION INITIATIVE

Alex Ricciardulli, L.A. County Deputy Public Defender

September 3, 2004

ATTACHMENT B

Download: Prop66Comprehensive.wpd

Link to Prop. 66 Summary

Back to HOME.

The following is a comprehensive review of changes that would be made if Prop. 66 is enacted. A quick summary of the changes is available for members of the L.A. County Public Defender's Office in the PDWeb's 3-Strikes box at Prop66Summary.wpd.

Introduction

If Prop. 66 is approved by the voters on November 2, 2004, its provisions will go into effect the day after the election, on November 3, 2004. (People v. Smith (1983) 34 Cal.3d 251, 261.) The principal changes made by Prop. 66 include:

- The 25-life sentence will only apply when a defendant's current offense is serious or violent, like the defendant's two or more strike priors.

- A doubled sentence will only apply when a defendant's current offense is serious or violent, like the defendant's single strike prior.

- There will be many fewer crimes usable as strikes (e.g., no res. burglaries when no one is home, no gang crimes, no criminal threats, no priors which originated from multiple counts in a single past case, etc.).

- Punishment is increased for a very limited number of sex crimes against children.

The issue of what parts of Prop. 66 are retroactive is extremely important, and not very clear. It is certain that defendants who were sentenced to 25-life or more in prison before November 3, 2004, for current offenses that are not serious or violent felonies will come back for resentencing. It is also certain that the parts of Prop. 66 that increase punishment cannot be applied retroactively to crimes that happened before

November 3.

It is fairly clear that Prop. 66 applies to defendants who were convicted of non- serious, non-violent current offenses with two strikes who had not been sentenced as of November 3. It is also pretty clear that the lists of serious and violent felonies used to see if 25-life defendants get the benefit of Prop. 66 are the lists as amended by Prop. 66.

It is unclear whether Prop. 66 applies to defendants who received doubled sentences before November 3 where the current offense is non-serious and non-violent. The same goes for defendants who were sentenced before November 3, and their priors are no longer on the serious or violent lists. It is also unclear whether defendants sentenced under the 85% rule for crimes that are no longer violent come back for resentencing. A detailed discussion of these issues is provided below.

Review of Prop 66

Below is a summary of the different provisions of Prop. 66. Prop. 66's impact can be divided into six areas: (A) Child molest cases; (B) 3-Strikes; (C) Violent felonies; (D) Serious felonies; (E) Juvenile cases; and (F) Retroactivity.

A. PUNISHMENT INCREASED FOR CHILD MOLESTATION

Prop. 66 increases punishment for a very limited number of child molestation cases, while potentially reducing punishment for other child molestation cases. There are three specific changes made here.

1. Under current law, when a person commits sexual penetration or oral copulation of a minor under the age of 14 and the defendant is at least 10 years older than the minor, the crime is punished by 3, 6, or 8 years imprison.

- **Prop. 66 would increase this punishment 6, 8, or 12 years in prison.**

2. Current law does not provide for increased punishment if the victim of the sexual penetration or oral copulation crime described above is under the age of 10.

•Prop. 66 would provide for a 25-years-to-life sentence for a first offense of sexual penetration or oral copulation when the victim is under 10 and the defendant is at least 10 years older, "but the court retains discretion" to impose a sentence of 6, 8, or 12 years.

3. Under current law, when a defendant commits a lewd act on a child under the age of 14, and the defendant has at least one lewd act prior conviction, under the One Strike law (Pen. Code, § 667.61), the defendant must be sentenced to 25-years-to-life, and the judge cannot reduce this sentence.

•Prop. 66 would provide that when a person suffers "a second conviction" of the sexual penetration or oral copulation crime previously described, the defendant gets 25- years-to-life, "but the court retains discretion" to impose a reduced sentence. (Since every sex penetration and oral copulation constitutes a lewd act, when a defendant qualifies under both this section and the One Strike law, the defendant could argue that the judge would "retain discretion" to impose a lesser sentence; this results in the weakening of existing law.)

B. CHANGES TO THREE STRIKES LAW

Three changes are made to the way that the 3-Strikes law operates.

1. Existing law subjects defendants who commit any felony and who have at least two strike priors to a 25-years-to-life sentence.

•Prop. 66 would limit the 25-life sentence to defendants whose current offense is serious or violent.

2. Existing law subjects defendants who commit any felony who have one strike prior to a doubled sentence.

•Prop. 66 would provide that only defendants with a current serious or violent felony get a doubled sentence. (As discussed below, Prop. 66 would also reduce the type of priors that count as serious or violent.)

3. Existing law does not require that strike priors be "brought and tried separately," meaning that multiple priors can originate from different counts in a single past case.

•Prop. 66 would require that in order for priors to count as strikes, they would have to be have been separately brought and tried. This would mean, for example, that a person who pled or was found guilty of six counts of robbery on the same day would only have one strike prior. This limit would also eliminate the exception in Garcia (1999) 21 Cal.4th 1 to the rule that the only juvenile adjudication priors are those in WIC § 707(b). Under Garcia, if the defendant was found a ward of the court for an offense listed as a serious or violent felony (PC §§ 667.5(c), 1192.7(c)) which was not listed in WIC § 707(b), and at the same time he was also found a ward of the court for a crime that was listed in WIC § 707(b), then the non-707(b) offense does count as a "strike" (and so does the 707(b) offense). However, since "strike" priors would have to have been brought and tried separately, if the defendant got his adjudications at the same time, he or she would have only a single "strike" prior.

C. ELIMINATION OF VIOLENT FELONIES

Prop. 66 reduces the type of priors that count as violent felonies under Penal Code section 667.5, subdivision (c). The impact is to limit the application of the 3-Strikes law, and the 85% reduction of time credits provision in Penal Code section 2933.1. (The Pen. Code § 2933.1 statute requires that even first-time offenders for crimes on the 667.5(c) list must serve 85% of a sentence instead of merely 50%.)

Only one type of violent felony is eliminated by Prop. 66:

Under existing law, any felony where it is proved that the defendant personally inflicted great bodily injury under Penal Code section 12022.7 is considered a violent felony. The statute does not require that the defendant intend to cause injury; all that is needed is that the defendant intend to commit the underlying act and that GBI result.

•Prop. 66 would provide that a crime counts as a violent felony only when the defendant causes great bodily injury, and specifically intends that GBI be inflicted. The biggest impact is on drunk driving cases causing injury because defendants almost never intend to injure anyone.

D. ELIMINATION OF SERIOUS FELONIES

Prop. 66 deletes seven types of crimes from the list of serious felonies in Penal Code section 1192.7, subdivision (c). Fewer cases would thus be usable as strikes. Also, fewer cases would count as five-year priors when the current crime is a serious felony and the defendant commits a new serious felony. By deleting crimes from this list, the plea bargaining ban in Section 1192.7 would also not apply to the omitted crimes.

Here are the seven deleted offenses:

1. Under existing law, all felonies where the defendant personally inflicted great bodily injury are serious felonies, even if the defendant did not intend to cause the injury.

•Prop. 66 would provide that a crime counts as a serious felony only when the defendant causes great bodily injury, and specifically intends that GBI be inflicted. This means that many priors for Penal Code section 245 would no longer count as strikes. For example, if the defendant inflicted GBI in his prior, but the record does not show he had the specific intent to cause GBI, the Section 245 prior would not count as a strike.

2. Under existing law, all arsons count as serious felonies, even ones involving non- residential structures and personal property, like cars.

•Prop. 66 would provide that only residential arsons and ones causing great bodily injury count as serious felonies.

3. Under existing law, all burglaries of residences count as serious felonies, even when no person was home at the time of the crime.

•Prop. 66 would only count residential burglaries as serious felonies when it is charged and proved that someone was home. (This is a huge reduction: most strike priors are burglaries, and prior to March 7, 2000, it was never charged and proved that someone was home. It was only after March 7, 2000, that the prosecution could allege that someone was home to trigger the 85% credit reduction in Penal Code section 2933.1. For practical purposes, burglary priors will no longer count as strikes.)

4. Under existing law, crimes committed on behalf of a gang under Penal Code section 186.22 are serious felonies.

•Prop. 66 would delete gang crimes from the serious felony list.

5. Under existing law criminal threats under Penal Code section 422 are serious felonies.

•Prop. 66 would delete criminal threats from the list.

6. Under existing law, attempted residential burglary is a serious felony.

•Prop. 66 would remove attempted residential burglaries from the list.

7. Under existing law, conspiracy to commit any crime on the list counts as a serious felony.

•Prop. 66 would provide that conspiracy to commit an assault is no longer on the serious felony list.

In addition, the crime of robbery would not count as a serious felony unless it was an armed robbery or an armed bank robbery. Nonetheless, the crimes of unarmed robbery and unarmed bank robbery would still be violent felonies.

The impact of this change is that unarmed robbery and unarmed bank robberies would not be five-year, Penal Code section 667, subdivision (a), priors. However, they would still be strike priors because they would remain on the list of violent felonies. (Pen. Code § 667.5, subd. (c)(9), counts "Any robbery" as a violent felony.) Since they are violent felonies, unarmed robbery and unarmed bank robbery would still be subject to the 85% credit limit in Penal Code section 2933.1

E. ELIMINATION OF JUVENILE PRIORS

Prop. 66 would eliminate two types of crimes from the list in Welfare and Institutions Code section 707, subdivision (b). Since strike priors for juvenile adjudications when the defendant was 16 or 17 years old must be on the 707 list, this would reduce the number of strike priors available. (As discussed above, the requirement that priors be brought and tried separately would eliminate even more juvenile strike priors.) Eliminating crimes from the 707 list would also reduce the type of cases where a transfer to adult court can occur.

1. Under existing law, designated crimes against persons 60 years of age or older are included in the 707 list.

•Prop. 66 would remove these crimes from the 707 list.

2. Under existing law all crimes for intimidation of witnesses and applying influence on witnesses are on the 707 list.

•Prop. 66 would limit the offenses on the 707 list to intimidation and influence crimes accompanied by force or violence.

F. RETROACTIVITY

Prop. 66 expressly provides that all persons who were sentenced under the previous 3-Strikes law who would no longer qualify for a life sentence because their current offenses are non-serious, non-violent felonies must be resentenced.

Ex post facto would bar applying the child molestation parts of Prop. 66 to defendants who committed their current crime before November 3, 2004. (These defendants will not be discussed any further here.)

Other than these two sets of defendants, all other retroactivity issues are uncertain. There are extensive procedures specified for how to deal with the 25-life defendants, but Prop. 66 is silent regarding everyone else.

This area of law is a real quagmire! The retroactivity issues are divided into the following parts, which are discussed separately below:

(1) Defendants sentenced before Nov. 3 to 25-life for non-serious, non-violent current offenses;

(2) Defendants who committed non-serious, non-violent current offenses with **two** strike priors but had not been sentenced as of Nov. 3;

(3) Defendants who committed non-serious, non-violent current offenses with **one** strike prior but had not been sentenced as of Nov. 3;

(4) Defendants sentenced before Nov. 3 to doubled terms for non-serious, non-violent current offenses;

(5) Defendants who committed current crimes before Nov. 3 and whose priors are no longer on the lists of strikes or who were sentenced to doubled terms or 25-life before Nov. 3 whose priors are no longer on the lists; and

(6) Defendants who committed current violent felonies before Nov. 3 that are no longer on the violent felony list.

1. Defendants Sentenced Before Nov. 3 To 25-life For Non-serious, Non-violent Current Offenses

Scope:

Section 11 of Prop. 66 is entitled "Release of Qualified Individuals." Section 11 specifically states that "a person who was convicted of a felony and is currently serving an indeterminate term of life in prison" must be resentenced if (1) "The person was sentenced pursuant to Section 667, 1170.12, or both of the Penal Code and/or 707 of the welfare and institutions code prior to those sections being amended by this act" and (2) "The currently charged felony resulting in the imposition of an indeterminate term of life in prison was not described as a violent or serious felony pursuant to this act." (Prop. 66, § 11, subd. (a).)

It is fairly clear that the lists that are used to determine if the current crime is serious or violent are the reduced lists created by Prop. 66. For example, if the current offense was a residential burglary when no one was home, or a violation of Penal Code section 245 where the defendant did not have specific intent to cause GBI, even though these crimes were serious felonies before Prop. 66 was enacted, since they are no longer such felonies, the defendant would be entitled to come back for resentencing. The trial transcript or other court record would have to be consulted to determine if anyone was home during the burglary or whether the defendant had specific intent to cause GBI in the current offense.

Under Blakely v. Washington (2004) 542 U.S. ___, 124 S.Ct. 531, 159 L.Ed.2d 403, a defendant might be entitled to a jury determination regarding whether anyone was home or whether he or she had the specific intent to cause GBI. It is possible that in the new trial the prosecution could not simply rely on the previous trial's transcript, and would have to bring to court the actual witnesses.

Even defendants serving 25-life due to a guilty plea (which are rare because most went to trial) get to come back for resentencing. (Prop. 66, § 11, subd. (b).)

The defendant must be re-sentenced "in compliance with the sentencing laws as amendment by this act." (Prop. 66, § 11, subd. (d).) This means that regardless of the number of strike priors, if the defendant was serving 25-life in prison, and the current offense was not serious or violent, the defendant must be resentenced to a non-doubled sentence. (The doubled sentence, "as amendment by this act," only applies when the defendant has one strike prior and the current offense is serious or violent.)

Mechanics of resentencing:

For defendants sentenced within 120 days from Nov. 3, a judge has the power to recall a sentence under Penal Code section 1170, subdivision (d). For other defendants, and for ones where the judge refuses to order a recall, it is not clear how the resentencing process is initiated.

Prop. 66 mentions a "written motion," but does not specify whether it is the defendant or his lawyer that files the motion, nor does it specify what the motion must contain. Other parts of Prop. 66 appear to require courts to remand defendants for resentencing automatically, even without a motion. Prop. 66 does expressly state that a defendant who meets the criteria for re-sentencing is entitled to counsel. (Prop. 66, § 11, subd. (f).)

The defendant must waive double jeopardy in writing. (Prop. 66, § 11, subd. (c).) This means that when

the defendant comes back for resentencing, the prosecution can generally file charges which were either originally not filed or were dismissed, so long as the charges were based on the same set of operative facts as the current offense. The prosecution will also be allowed to add prison and other priors which were dismissed or not charged.

However, under no circumstances may the resentencing or any new trial result in a sentence which is longer than the original sentence. (Prop. 66, § 11, subd. (f).)

The case must be heard by the original judge who heard the trial or accepted the guilty plea, "unless the presiding judge determines that judge is unavailable." (Prop. 66, § 11, subd. (j).) If the original judge is sitting in another department, can he or she be declared "unavailable"? Unknown.

Qualifying defendants must be remanded to court and re-sentenced "no less than 30 days, and no more than 180 days, of this Act becoming effective, unless the qualifying individual personally waives this right" during the 180-day period. (Prop. 66, § 11, subd. (l).) Due to the burden on the court system of resentencing thousands of defendants, it is possible that defendants might waive their 180-day re-sentencing right and be simply released from prison and ordered to come to court if they meet the criteria for re-sentencing. This would appear especially appropriate if a defendant would likely get time-served upon resentencing.

2. Defendants Who Committed Non-Serious, Non-Violent Current Offenses With **Two** Strike Priors But Had Not Been Sentenced As Of Nov. 3

As discussed above, when a defendant has been sentenced to 25-life before Nov. 3 for a non-serious, non-violent current offense, Prop. 66 expressly states that such a defendant gets resentenced. (See Prop. 66, § 11.) However, Prop. 66 is silent regarding whether a defendant convicted but who has not been sentenced as of Nov. 3 for a non-serious, non- violent current offense with two strike priors is entitled to Prop. 66 sentencing. Likewise, Prop. 66 is silent regarding whether a defendant who committed a non-serious, non-violent current offense with two strike priors before Nov. 3 but had not been convicted as of Nov. 3 is entitled to Prop. 66 sentencing.

In analyzing whether a statute that reduces punishment applies to cases where the conviction or commission of the crime occurred before the statute was enacted, courts first look to whether the statute itself states it is retroactive. If the statute is silent, courts look to the Legislature or voter's intent regarding retroactivity. For initiatives such as Prop. 66, the contents of the Voter Information Pamphlet are considered very important. Finally, courts try to avoid avoiding equal protection problems in construing a statute's retroactivity. (See generally Tapia v. Superior Court (1991) 53 Cal.3d 282.) Generally, statutes which reduce punishment are presumed to operate retroactively unless they

specifically state or are meant to operate otherwise. (In re Estrada (1965) 63 Cal.2d 740; People v. Nasalga (1996) 12 Cal.4th 784.)

It is fairly clear that Prop. 66 will apply to defendants convicted but who were not sentenced as of Nov. 3 for non-serious, non-violent current offenses with two strike priors, as well as defendants who committed their current crimes and had not been convicted as of Nov. 3. The text of the statute is silent on these issues. Likewise, the Voter Information Pamphlet does not address these questions. Since nothing precludes retroactivity for these defendants, the presumption in favor of applying a sentence-reducing statute retroactivity appears to apply.

A strong equal protection argument could be raised if Prop. 66 did not apply to these defendants. For example, allowing a person sentenced to 25-life on Tuesday Nov. 2 to get his sentence reduced, but not allowing a reduction for a defendant sentenced to 25-life on Wednesday Nov. 3 would likely violate equal protection. But for the timing of sentencing, which is often outside a defendant's control, the Nov. 2 and Nov. 3 defendants would be similarly situated, and there is no rational basis for the disparate treatment.

The main intent of Prop. 66 to is to limit the 25-life sentence for defendants whose current offense is serious or violent. That intent is best served by full retroactivity here.

3. Defendants Who Committed Non-Serious, Non-Violent Current Offenses With **One** Strike Prior But Had Not Been Sentenced As Of Nov. 3

The same factors that favor applying Prop. 66 to defendants with two strike priors that had not been sentenced as of Nov. 3 or who had committed their current offense before Nov. 3 and had not yet been convicted as of Nov. 3 favor applying Prop. 66 to defendants with one strike prior in this same situation. This issue is less clear than the one involving the 25-life group, but good arguments can be made for extending Prop. 66 in this manner.

The presumption in favor of retroactivity and equal protection are in favor of applying Prop. 66 to defendants who committed current non-serious, non-violent offenses with one strike but had not been sentenced as of Nov. 3. There is nothing in the text of the law or in the Voter Information Pamphlet that discuss this relatively small group of people: the Voter Information Pamphlet only covers resentencing defendants, not the initial sentencing.

4. Defendants Sentenced Before Nov. 3 To Doubled Terms For Non-serious, Non-violent Current

Offenses

This issue promises to be extremely contentious. Does Prop. 66 apply to the approximately 20,000 defendants currently serving doubled sentences for non-serious, non- violent current offenses?

The text of the statute is not clear on this issue. The first sentence of Prop. 66 § 11 states that "Any individual sentenced under the prior three strikes law, including, but not limited to," the 25-life provisions, "shall qualify for re-sentencing." (Emphasis added.) It could be argued that the "not limited to" language is meant to allow defendants sentenced under the doubling provisions to be re-sentenced. Another reading would merely emphasize the part that requires resentencing for "Any individual sentenced under the prior three strikes law," which includes defendants previously sentenced under the doubling provisions of the Three Strikes law.

However, the remainder of § 11 discusses resentencing only defendants who got 25- life for non-serious, non-violent current crimes. Even so, there is nothing in Prop. 66 that states that defendants serving doubled terms don't get resentenced.

The "Findings and Declarations" section of Prop. 66 (§ 2) includes both lifers and doubled sentences in stating that taxpayers have wasted 800 million dollars per-year incarcerating non-violent offenders. The figure of 35,000 inmates which this section uses includes doubled sentences. This seems to indicate that Prop. 66 means to relieve the taxpayers of this continuing burden by resentencing all 35,000, which includes the doubled terms.

The Voter Information Pamphlet is contradictory. The Legislative Analyst's description in the pamphlet specifies that 25-lifers get resentenced, but does not say that only 25-lifers get resentenced. It does not say that defendants with doubled terms don't get resentenced. The Legislative Analyst does say that there would be prison savings because Prop. 66 requires "resentencing of some third strikers," but it does not say that this would be the sole savings to prisons.

The Arguments in Favor and Against Prop. 66 in the Voter Information Pamphlet are also at odds on this issue. Regarding the number of defendants that will be resentenced, the Argument Against uses figures which include doubled terms; the Argument in Favor uses numbers that include only life sentences. (The opponents of Prop. 66, which include the Calif. D.A.'s Assn., use large numbers to try to scare people from voting for Prop. 66; the proponents of Prop. 66 use lower numbers to make the law more palatable.)

The strongest argument in favor of applying Prop. 66 to defendants serving doubled terms is equal protection. It can be argued that if the statute does not allow resentencing for doubled terms, it would be unconstitutional. The argument goes like this:

Assuming that the initiative bars retroactivity for doubled terms, the structure of the new law would look like this:

1. Applying the law for persons who commit crimes after the date Prop. 66 is approved, persons who commit serious or violent felonies with one strike prior get a doubled sentence. Persons with two or more strikes who commit a serious or violent offense get a life sentence. Persons who commit non-serious, non-violent current felonies do not get a doubled or life sentence regardless how many strike priors they have.

2. With respect to persons who committed their current offenses before Prop. 66 took effect on Nov. 3, if they had one strike prior, even if their current offense had been non-serious and non-violent, they do not get their sentence reduced; they must serve their doubled sentence. But if they had two or more strike priors and their current offense was non-serious and non-violent, they get resentenced. The resentencing must be in accord with the Prop. 66, so these persons would not be resentenced to doubled terms, they would be resentenced to non-doubled, regular terms. (See Prop. 66, § 11, subd. (d).)

3. This scheme would be unconstitutional because it would lack a rational basis and deny equal protection to inmates. Defendants who got doubled sentences for non-serious/non-violent current offenses before the Prop. 66 was approved and had only one strike prior would be treated more harshly than those who had two or more strike priors. Imposing greater sentences on less culpable persons is irrational and unconstitutional.

In all likelihood, rather than hold that all of Prop. 66 is unconstitutional, a court would probably just say that this is another reason for applying retroactively the provisions

regarding doubled terms.

5. Defendants Who Committed Current Crimes Before Nov. 3 And Whose Priors Are No Longer On The Lists of Strikes Or Who Were Sentenced To Doubled Terms Or 25-Life Before Nov. 3 Whose Priors Are No Longer On The Lists

Prop. 66 removes several crimes from the serious and violent felony lists, as well as from the lists of

juvenile adjudications that count as strikes. Prop. 66 also requires that priors have been brought and tried separately, which means that strike priors cannot have originated from multiple counts in a single past case. Prop. 66 additionally removes unarmed robberies and unarmed bank robberies from the list of five-year priors in Penal Code section 667, subdivision (a).

Do these changes apply retroactively? This is unclear.

There are two groups of defendants here: those that were sentenced by Nov. 3 for crimes where one or more of their priors is no longer on the strikes lists, and those who had not yet been sentenced and may not yet have even been convicted.

The statute is silent on whether or not any of these defendants get the benefit of Prop. 66, and the same goes for the Legislative Analyst's description of Prop. 66. The Arguments in Favor and Against in the pamphlet are in conflict on this issue.

The Argument Against states that Prop. 66 will release "rapists, child molesters, and murderers." The Argument in Favor states that Prop. 66 will not release any inmates "serving time for rape, murder, or child molestation." (The only way that defendants serving current sentences for serious or violent crimes like rape or child molestation will be released is if their priors no longer count as strikes.)

It's unknown whether equal protection is implicated here. It's not at issue to the same extent as in the situation facing defendants serving doubled terms discussed above.

6. Defendants Who Committed Current Violent Felonies Before Nov. 3 That Are No Longer On The Violent Felony List

The final group of defendants are ones that committed current felonies for personal infliction of GBI where they did not specifically intend to injure the victim. Some of these defendants will have been sentenced to serve 85% of their prison term prior to Nov. 3. Others will have not yet been sentenced or convicted as of Nov. 3.

Does Prop. 36 apply to these defendants? Do these defendants get resentenced to serve 50% of their terms? Like other retroactivity issues, this is unclear.

The statute is silent on this issue, and so it the Legislative Analyst's description of Prop. 66 in the Voter Information Pamphlet. The Argument in Favor does not say anything specifically addressing this group of people.

However, the Argument Against states that Prop. 66 was bankrolled by a wealthy businessman whose son is in prison for inflicting GBI. The Argument Against Prop. 66 states, "If it passes, his son will be released early." It is true that a businessman's son is serving an 85% sentence for two counts of vehicular manslaughter where he did not specifically intend to cause GBI. It is also true that the businessman donated over a million dollars to get Prop. 66 on the ballot. It is true that if Prop. 66 applies retroactively here, his son will get out after serving 50% rather than 85% of his sentence. If the voters approve Prop. 66, it can be argued that the Argument Against's uncontradicted statement regarding the impact of Prop. 66 on this type of defendant is indication that the voters intended that Prop. 66 apply retroactively to these type of defendants. Equal protection does not seem to be implicated here.

Conclusion

The prospective application of Prop. 66 is straightforward. Other than Prop. 66's application to defendants who were sentenced to 25-life for current non-serious, non-violent offenses as of Nov. 3, the retroactive application of Prop. 66 is extremely complicated. Assuming that Prop. 66 is approved, it will take several years of appellate litigation to fully interpret the statute's provisions.

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